a slightly archaic ring. As Fry L.J. said in *Howe* v. *Smith* at page 101:

"It (*i.e.*, the deposit) is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract."

It is worth pointing out that the contract in *Howe* v. *Smith* provided that the sum of £500 there in question was as here paid "as a deposit and in part payment of the purchase money" and Cotton L.J. at page 95 in referring to the judgment of James L.J. in *Ex parte Barrell*,[15] said:

"What is the deposit? The deposit, as I understand ... is a guarantee that the contract shall be performed. If the sale goes on of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then ... he can have no right to recover the deposit."

Or, more simply, in the words of Lord MacNaghten in *Soper* v. *Arnold*[16] at page 435:

"Everybody knows what a deposit is. ... The deposit serves two purposes — if the purchase is carried out it goes against the purchase money — but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

No doubt, as Cotton L.J. says in *Howe* v. *Smith* at page 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. See *Stockloser* v. *Johnson*.[17] It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective "reasonable" before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

In the result therefore their Lordships will advise the Head of Malaysia that the appeal should be allowed and the judgment of the trial judge dismissing the respondent's claim restored and that the respondent should pay the costs of the appeal and of the hearing before the Federal Court.

Appeal allowed.

Solicitors: *E. F. Turner & Sons.*

A SINGAPORE REPORTS

YIK WAH TRADING (PTE) LTD. v. TAN KING KAK & ANOR.

[O.C.J. (Winslow J.) December 22, 1971]

[Singapore — Suit No. 1619 of 1970]

Moneylenders — Loan transaction — Joint promissory note by borrower and surety — Memorandum in writing — Various contraventions of the provisions of the Moneylenders Ordinance, 1959, ss. 16, 26 and 30.

This was a claim by the plaintiffs, a private limited company carrying on the business of licensed moneylenders, for $5,000 with interest against the first defendant, Tan King Kak and the second defendant, Sam Trading Co. (sued as a firm of which Tan King Kak himself is the sole proprietor) on a promissory note dated April 29, 1970. It was undisputed that the second defendant company was a surety of the first defendant. Alternatively, the plaintiffs' claim was against the second defendant (Sam Trading Co.) alone as drawer of two cheques dated July 2, 1970 totalling $5,000 payable to cash or bearer which were dishonoured and still remained unpaid.

The defence as pleaded was to the effect that —

(a) the plaintiff company was prepared to lend $3,000 only in the first instance;

(b) if the first defendant wanted $5,000 he would have to pay $500 service charges;

(c) the said sum of $500 was accordingly paid by the first defendant;

(d) the plaintiff company gave him two crossed cheques, one for $3,000 and another for $2,000.

The first defendant also pleaded that he did not understand the English language and that the promissory note was accordingly void and unenforceable because of non-attestation as required by section 30 of the Moneylenders Ordinance, 1959.

The first defendant also claimed in his defence that no copy of the said promissory note duly authenticated by the plaintiff company was delivered to him as required by section 16 of the said Ordinance and that the said promissory note did not fully contain the terms of the contract between the parties.

The defence also claimed that two cheques totalling $5,000 were taken by the plaintiff company as additional or collateral securities in respect of the money-lending transaction between the parties and that these cheques were not in the name of the plaintiff company.

The defence of the second defendant adopted the above contentions.

Held: (1)(a) there was a clear contravention of section 26 of the Moneylenders Ordinance with regard to the taking of service charges; (b) there was a clear contravention of section 30 of the Ordinance in that as the borrower was a person who did not understand the written language on the promissory note which was taken as security, the note was void; (c) no copy of the promissory note, authenticated by the lender, was delivered to the defendant; (d) the taking of two cheques from the second defendant as additional security, in the name of the registered moneylender, had been omitted from the contract, which was a clear contravention of section 16 of the Moneylenders Ordinance;

(2) as to the alternative claim against the second defendant, the cheques could not be regarded *in vacuo* as cheques given otherwise than as cheques given by a surety. The terms of the contract between the parties were not set out in the promissory note. Moreover, the cheques were not made out in the authorized name of the licensed moneylender as payee, as required by section 8(a) of the Ordinance, and the taking of such cheques was accordingly illegal;

(3) therefore, as the claim against the borrower failed, the claim against the surety became unenforceable.

Per curiam: "The provisions of the Moneylenders Ordinance as they stand would be rendered farcical if money-

lenders could recover monies advanced by way of loan in the circumstances revealed by this case. Not only have they failed to set out the exact terms of their contract with the alleged borrower but they have also acted illegally in securing undated cash or bearer cheques from the alleged surety. A striking feature of this case is the fact that the surety also happens to be a firm of which the borrower is the sole proprietor. Another feature revealed by the evidence is that the money was actually required by the surety for the purchase of an earth excavator for the firm's business. The firm was in fact the borrower, and the cheques were provided by the firm as security for the loan."

Cases referred to:-

(1) *Kent Trust Ltd.* v. *Cohen* [1946] 1 K.B. 584.

(2) *Temperance Loan Fund* v. *Rose & Anor.* [1932] 2 K.B. 522.

CIVIL SUIT.

Ong Tiang Choon for the plaintiffs.

P. Suppiah for the defendants.

Cur. Adv. Vult.

Winslow J.: This was a claim by the plaintiffs, a private limited company carrying on the business of licensed moneylenders, for $5,000 with interest against the first defendant, Tan King Kak and the second defendant, Sam Trading Co. (sued as a firm of which Tan King Kak himself is the sole proprietor) on a promissory note dated 29th April 1970 (Ex. AB1). It is undisputed that the second defendant company was a surety of the first defendant. Alternatively, the plaintiffs' claim was against the second defendant (Sam Trading Co.) alone as drawer of two cheques dated 2nd July 1970 totalling $5,000 payable to cash or bearer which were dishonoured and still remain unpaid.

The defence as pleaded was to the effect that—

(a) the plaintiff company was prepared to lend $3,000 only in the first instance;

(b) if the first defendant wanted $5,000 he would have to pay $500 service charges;

(c) the said sum of $500 was accordingly paid by the first defendant;

(d) the plaintiff company gave him two crossed cheques, one for $3,000 and another for $2,000.

The first defendant also pleaded that he does not understand the English language and that the promissory note was accordingly void and unenforceable because of non-attestation as required by section 30 of the Moneylenders Ordinance, 1959.

The first defendant also claimed in his defence that no copy of the said promissory note duly authenticated by the plaintiff company was delivered to him as required by section 16 of the said Ordinance and that the said promissory note does not fully contain the terms of the contract between the parties.

The defence also claimed that two cheques totalling $5,000 were taken by the plaintiff company as additional or collateral securities in respect of the money-lending transaction between the parties and that these cheques were not in the name of the plaintiff company.

The defence of the second defendant adopts these contentions.

The plaintiff company called one witness, P.W.1, Ng Kian Hua, its managing director, who gave evidence to the effect that he discussed the terms of the loan with the first defendant between 11.00 a.m. and 12.00 noon on 29th April 1970 in Hokkien. He said that the first defendant would get the firm of which he was sole proprietor to stand surety for him and that he showed him the printed form AB1, in blank which, according to this witness, the first defendant said he understood by replying "O.K.".

He then said he instructed his clerk to complete the note and went back to his own room leaving his clerk with the first defendant. Later, according to him, the clerk came to his room and told him that she had prepared and explained the agreement to the first defendant and that the first defendant had made out two cheques which she, the clerk, handed to the witness (AB3 and AB6).

He then said that she (the clerk) made out two cheques which he said were crossed for $2,000 and $3,000 and dated the same day. He denied asking for service charges of $500.

On 3rd July 1970 he banked the two cheques, AB3 and AB6, which were returned marked "refer to drawer". He said he gave the defendant two cheques because the defendant asked him to make out two cheques. He then corrected this by saying that his clerk told him that the defendant wanted two cheques.

In support of his contention that the defendant understood English, he said that he heard his clerk and the defendant speaking in English when they were seated in the office outside his own air-conditioned room. (It should be noted that this witness himself does not understand English.)

He said that he had no personal knowledge of the delivery of a copy of the promissory note to the defendant.

After some hesitation, in answer to a question by counsel for the defence whether he had visited the worksite of the defendant in Beach Road to find out his worth, he replied that he could not remember anything apart from going to the worksite to serve the writ. He denied that the transaction was completed at about 2.30 p.m. that afternoon. He insisted that it was over by noon.

He denied that the transaction took place between him and the defendant alone in his air-conditioned room. His reply to a question on this point was that the clerk was also there outside his room. When asked who dated the two cheques given by the defendant, he replied that he did not know. In particular, about the date chop on AB3 on the cheque for $2,000 he said that one of his clerks must have done it. He could not remember if the two cheques given by the defendant were undated.

At the continued hearing of the case on 19th July 1971, the plaintiffs rested the case where it had been left on 24th May 1971, since the managing director (P.W.1) had resigned and the clerk, Madam Tay, was not available.

For the defence, counsel had necessarily to call only one person to speak on behalf of both the defendants, namely, Tan King Kak himself who was also the sole proprietor of the second defendant firm. Although there are technically two defendants, they consist of only one human being acting in two different capacities. This witness said that he signed the promissory note whilst it was blank both as borrower and as surety on behalf of the second defendant, Sam Trading Co. He said that he could not read or write English except that he had learned how to sign his name in English.

After observing his demeanour carefully in the box and taking it in conjunction with the evidence given by the plaintiffs' only witness and that by the first defendant that he did not understand the English language, except for a few words, I was satisfied that he was incapable of understanding what was written on Ex. AB1 which he said he saw in blank apart from the printed words. I was also completely satisfied that of the two witnesses, Tan King Kak was telling the truth, not only with regard to his lack of understanding of the English language, either written or spoken, but also as to the details of what took place between him and the managing director of the plaintiff company on 29th April 1970.

I accept his evidence that he dealt with the managing director alone, that he paid what he called "football money" of $500 since the managing director insisted that he would only lend him $3,000 in the first instance and that if he, the defendant, insisted on $5,000 he would have to give him $500 service charges.

I accept the evidence that he took the managing director to the site and that the transaction between them was completed in the afternoon sometime past 2 p.m.

I am satisfied that he gave P.W.1 two cash cheques payable to bearer which he left undated and that P.W.1 himself tore out the second of these cheques from the middle of the second defendant's cheque book. I am satisfied that the defendant gave these cheques at the managing director's request. The managing director himself said he took the cheques as security. It is obvious from looking at the two cheques, AB3 and AB6, that they were written in different ink and that the signatures of Tan King Kak were placed on these two cheques by means of two different writing instruments. One may ask — why did they give each other two cheques? Was this because P.W.1 was only prepared to lend $3,000 initially? It would seem so. In the ordinary way one would have expected the managing director, if he is telling the truth about the transaction, to give him one cheque for $5,000, which he did not.

I am satisfied with regard to the contentions put forward by Mr. Suppiah as counsel for the defence that there were the following contraventions of the provisions of the Moneylenders Ordinance:—

(I) There was a clear contravention of section 26 of the Moneylenders Ordinance with regard to the taking of service charges;

(II) There was a clear contravention of section 30 of the Moneylenders Ordinance in that as the borrower was a person who did not understand the written language on the promissory note which was taken as security such note should have been attested by an advocate and solicitor, a magistrate, justice of the peace, commissioner for oaths, *etc.* but this was not done. There was accordingly no compliance with the requirements of this section and the note was void;

(III) No copy of the promissory note authenticated by the lender was delivered to the defendant.

(IV) The taking of two cheques from the second defendant as additional security, in the name of the registered moneylender, has been omitted from the contract between the two parties (Ex. AB1) and there has been a clear contravention of the provisions of section 16 of the Moneylenders Ordinance (see *infra, Kent Trust Ltd.* v. *Cohen.*[1])

It seemed to me quite clear that the plaintiffs could not possibly succeed in their claim against the defendants as pleaded, on this moneylending transaction, in view of the breaches to which I have referred. As to the alternative claim against the second defendant, I found it difficult to hold that the giving of the two bearer cheques, AB3 and AB6, by the second defendant as surety, could be divorced from the moneylending transaction so as to enable the plaintiffs to claim successfully that they were entitled to cash the cheques on the ground that they were bearer cheques. In my judgment these cheques could not be regarded *in vacuo* as cheques given otherwise than as cheques given by a surety. The terms of the contract between the parties were accordingly not set out in the note at AB1. Moreover the cheques were not made out in the authorised name of the licensed moneylender as payee as required by paragraph (c) of section 8 and the taking of such cheques was accordingly illegal.

As the claim against the borrower failed, the claim against the surety became unenforceable. (See *Temperance Loan Fund* v. *Rose & Anor.*[2]).

Another authority preventing the success of the plaintiffs' claim is *Kent Trust, Ltd.* v. *Cohen*[1] which states, *per* Tucker L.J., that "in order to comply with the section (*i.e.* section 6), where security is given the memorandum must set out with accuracy what the security is".

In view of my findings of fact above and the law relating thereto I could not very well hold that the plaintiffs should at least get back the $5,000 actually paid to the first defendant by cheques about which there is no dispute.

The provisions of the Moneylenders Ordinance as they stand would be rendered farcical if moneylenders could recover monies advanced by way of loan in the circumstances revealed by this case. Not only have they failed to set out the exact terms of their contract with the alleged borrower but they have also acted illegally in securing undated cash or bearer cheques from the alleged surety. A striking feature of this case is the fact that the surety also happens to be a firm of which the borrower is the sole proprietor. Another feature revealed by the evidence is that the money was actually required by the surety for the purchase of an earth excavator for the firm's business. The firm was in fact the borrower and the cheques,

AB3 and AB6 were provided by the firm as security for the loan. In whatever way one views the transaction the terms of the contract have not been set out accurately in the promissory note at AB1. The claim therefore failed right from the start on that ground alone quite apart from the other breaches to which reference has already been made.

Judgment for the defendants.

Solicitors: *Ong Tiang Choon & Co.; P. Suppiah & Co.*

SUBRAMANIAM & ORS. v. COLLECTOR OF LAND REVENUE

[Appeals Board (Choor Singh J. Commissioner of Appeals), January 21, 1972]

[Singapore — Appeals Board No. 100 of 1967]

Land Laws — Compulsory acquisition — Compensation — Appeal against award — Determination of fair and correct award — Criteria used as a guide in ascertaining true market value of property — Land Acquisition Ordinance (Cap. 248) s. 10 — Land Acquisition Act, 1966, s. 23.

This was an appeal under section 23 of the Land Acquisition Act, 1966 by the owners of certain property who were aggrieved by the award made by the Collector of Land Revenue under section 10 of the Land Acquisition Ordinance (Cap. 248).

The subject property was acquired by the government under the provisions of the Land Acquisition Ordinance, (Cap. 248). Proceedings were commenced by declaration No. 2501 dated October 27, 1964, and published in the Government *Gazette* on December 22, 1964.

The property has a land area of 6,105 sq. ft. and was held on a lease for a period of 99 years from December 19, 1929. The ground rent reserved under the lease was $64 *per mensem*. On November 2, 1964, the lease had approximately 64 years unexpired.

The land was the site of a two-storey pre-war building providing three seperate units of accomodation — each let on a seperate rent controlled tenancy. The building has been demolished. It was constructed with brick walls, tiled roof and concrete lower floor. It had reinforced concrete beams supporting the upper floor which was of timber. The general state of the property was reasonable in relation to its age. The total gross annual rent income of the building was $3,131.64. The total annual value for property tax purposes was $3,085.

The site of the property is zoned in the 1958 Singapore Master Plan for residential use with a maximum density of 500 persons per acre. The existing use of the property was for residential and industrial *cum* commercial purposes; the major portion of the building being occupied by a bakery.

The depth of the property was approximately 70 feet, which differed from the majority of properties in the locality where the depth, after allowance for a backlane, was less than 70 feet and in some cases as little as 44 feet.

On March 24, 1965, the Collector of Land Revenue held an inquiry under section 10 of the Land Acquisition Ordinance (Cap. 248). The owners submitted a claim of $91,575 which was based on a value of $15 per sq. ft. The collector awarded a sum of $42,735 based on a value of $7 per sq. ft.

The owners filed a notice of appeal against the said award through their solicitors, in which they limited their claim to $71,400, based on a value of $11.70 per sq. ft.

On the question of comparables, evidence was given of recent sales of property in the vicinity. Expert evidence was given as to the various modes of valuation as a guide in ascertaining the true market value of the property. Two of the comparables cited by the expert witness called on behalf of the collector were disputed by the expert witness called on behalf of the appellants. The first was a valuation made for estate duty purposes and the second was for the sale by public auction of a property by trustees with the permission of the court wherein a reserve price had been fixed by the court.

On the request of the commissioner, evidence was also produced by the respondent of awards made in respect of several small lots acquired by the government in the vicinity of the subject property and which revealed that awards of $8 per sq. ft., $10 per sq. ft., $12.66 per sq. ft. and $16.54 per sq. ft. were made in respect of small single shop house lots totally devoid of any development potential.

Thus, the board had to consider the overall picture that emerged in the light of all the evidence and decide what was a perfectly fair and correct award in the circumstances of this case.

Held: (1) estate duty valuations are not a good guide in ascertaining the true market value of property. Such valuations are relevant and may be considered, but they do not carry the same weight as a genuine sale in the open market;

(2) the capitalization method used in valuing a rent controlled property cannot reflect the true value of property because the development potential of the property is entirely ignored in that method of valuation;

(3) the technique of taking two properties and making adjustments to arrive at the value of the second property is not a very satisfactory method of valuation especially when numerous adjustments have to be made;

(4) on the basis of all the evidence before the board, the award of $7 per sq. ft. in this case was inadequate and should be increased to $10 per sq. ft. As the subject lot has an area of 6,105 sq. ft., the award should be $61,050, and accordingly, the collector's award should be increased.

APPEALS BOARD.

M. Karthigesu for the appellants.

G. Starforth Hill for the respondents.

Cur. Adv. Vult.

Choor Singh J.: This is an appeal under section 23 of the Land Acquisition Act, 1966 by the owners of Lots 125-5, 125-4 and 125-3 of T.S. XV who are aggrieved by the award made by the Collector of Land Revenue under section 10 of the Land Acquisition Ordinance (Cap. 248).

The subject property was acquired by the Government under the provisions of the Land Acquisition Ordinance (Cap. 248). Proceedings were commenced by declaration No. 2501 dated the 27th October 1964 and published in the Government *Gazette* on the 22nd December 1964.

The property has a land area of 6,105 sq. ft. and was held on a lease for a period of 99 years from the 19th of December 1929. The ground rent reserved under the lease was $64 *per mensem*. On 2nd November, 1964, the lease had approximately 64 years unexpired.

The land was the site of a two-storey pre-war building providing three separate units of accommodation — each lot on a separate rent controlled tenancy. The building has been demolished but photographs of the demolished building as well as